

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

STEPHEN HERZBERG,

Plaintiff,

v.

OFFICE FURNITURE INNOVATIONS L.L.C., *et al.*,

Defendants.

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CIVIL ACTION H-08-508

MEMORANDUM AND ORDER ON DEFAULT JUDGMENT

Pending before the court are plaintiff Stephen Herzberg's requests for entry of default and motions for default judgment against defendants Rob Cross and Rob Cross Productions. Dkts. 21, 22. After reviewing Herzberg's motions, the record, and the applicable law, the motions are DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Stephen Herzberg ("Herzberg") filed this action on February 13, 2008, alleging that John Doe Photographer and Doe Photography Studio, among other defendants,¹ illegally infringed Herzberg's copyright by duplicating Herzberg's concept and image of the "Sit for the Cure"

¹ In his original complaint, Herzberg lists as defendants: Office Furniture Innovations, L.L.C.; Jayne Edison, individually; John Doe Photographer; Doe Photography Studio; and Does 1 through 10. Dkt. 1.

advertising campaign without paying a licensing fee.² Dkt. 1. Herzberg later filed an amended complaint on June 25, 2008, naming Rob Cross (“Cross”) and Rob Cross Productions as defendants in the case. Dkt. 13.

Cross was served with the complaint and summons on July 10, 2008, individually and on behalf of Rob Cross Productions, at 13042 Alston Road, Sugar Land, Texas. Dkts. 17, 18. Pursuant to Federal Rules of Civil Procedure 4(d) and 12(a), Cross and Rob Cross Productions were given twenty days to answer the complaint, which both failed to do.

On August 19, 2008, Herzberg filed requests for entry of default and motions for default judgment against Cross and Rob Cross Productions. Dkts. 21–22. The Certificates of Service indicate that a copy of each motion was delivered to counsel for all parties electronically and by facsimile.³ Dkts. 21–22.

ANALYSIS

Notwithstanding the aforementioned electronic and facsimile contacts, Herzberg did not properly serve Cross and Rob Cross Productions with the requests for entry of default and motions for default judgment in accordance with Local Rule 5.5. Pursuant to Local Rule 5.5, motions for default judgment must be served on the defendant by certified mail, return receipt requested. S.D. TEX L.R. 5.5. To date, Herzberg has not demonstrated service in compliance with Local Rule 5.5; therefore, Herzberg’s requests for entry of default and motions for default judgment are denied.

² Herzberg maintains that he owns the copyright for the “Sit for the Cure” image and concept, having filed a Visual Arts Copyright form on December 12, 2006, with the United States Copyright Office. Dkt. 1.

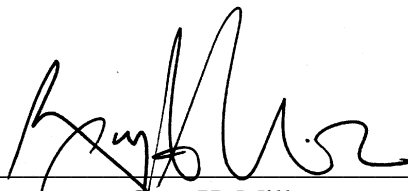
³ Herzberg’s counsel also maintains that she attempted to conference with Cross by telephone, but he terminated the call after counsel identified herself. Dkts. 21–22.

CONCLUSION

For the foregoing reasons, plaintiff Herzberg's requests for entry of default and motion for default judgment against defendants Rob Cross (Dkt22) and Rob Cross Productions (Dkt. 21) are DENIED without prejudice to refile after serving the defendants in accordance with the Local Rules.

It is so ORDERED.

Signed at Houston, Texas on October 9, 2008.



Gray H. Miller
United States District Judge

TO ENSURE PROPER NOTICE, EACH PARTY RECEIVING THIS ORDER SHALL
FORWARD IT TO EVERY OTHER PARTY AND AFFECTED NONPARTY